

Panel recommends Arizona courts toss 'cash bail' system



Megan Cassidy, The Republic | azcentral.com 7:04 a.m. MST September 5, 2016



(Photo: Getty Images/Stockphoto)

On a recent Monday, a man named Floyd Howesa was discovered sleeping in a Flagstaff Barnes & Noble parking lot.

The bookstore opted to press charges, resulting in Howesa's arrest for trespassing, a booking into the Coconino County Jail, and a bond set at \$250.

The tab might as well have been \$25,000. Howesa, a local man with a rap sheet of nuisance crimes, sat in jail for four days until a judge compromised on a \$100 bond.

Compare Howesa's case to that of former Arizona Cardinals running back Jonathan Dwyer, who was arrested Sept. 17, 2014, after reports surfaced that he head-butted his wife in the face after she refused sex.

Dwyer's bond was set at \$25,000, which was posted immediately. Altogether, the football player put in less than 12 hours behind bars, according to jail records.

Neither Howesa nor Dwyer had been convicted for their alleged crimes, and by law, were presumed innocent. Their disparate resources made the difference between awaiting trial in the comfort of their own home vs. in a concrete cell.

More importantly, even a few days of pretrial detention can mean the difference between working or getting fired, paying rent or getting evicted, or caring for a loved one or abdicating the responsibilities, said Hilary Berko, a Maricopa County public defender.

"Those are the things our clients face on an everyday basis," she said. "Imagine if you were to be taken out of commission ... what you would have to lose in those four or seven days? Those are things that our clients are losing as well."

A task force commissioned by Arizona's Supreme Court released a report in August that recommends that Arizona eliminate the "cash bail" system that has become customary in criminal cases across the country.

Rather than imposing a dollar figure to compel a defendant to show up for court, the report proposes fully relying on a "risk-based" pretrial release system. Those deemed low- or moderate risk would be out on their own recognizance or with electronic monitoring, and high-risk defendants would remain behind bars, according to the plan.

"We believe, and the research is showing, that money is not the best way to do this," said Dave Byers, administrative director of the courts and chair of the Task Force on Fair Justice for All.

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Byers said the cash bail system can ruin lives for those who can't afford it, and has proven statistically meaningless in ensuring defendants return to court. The recommendations come the same month as a U.S. Department of Justice brief that said it was unconstitutional to lock someone up because they can't afford bail.

Dissolving the cash bail system is one of a number of changes recommended by the Task Force on Fair Justice, which also endorses various methods of easing the burden of court fines.

Some defense attorneys are skeptical of the proposed changes, fearing that the new system could go too far in expanding the number of defendants who would not be eligible for bond.



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[How a \\$95 Phoenix speeding ticket becomes \\$243](#)

(<http://www.azcentral.com/story/news/local/phoenix/2016/01/27/how-95-phoenix-traffic-ticket-becomes-243/79375008/>)

The policy recommendations are just that for the time being, and a broader group of judges, prosecuting and defense attorneys and Arizona politicians soon will get a chance to weigh in.

The recommendations first will need to be presented to the [Arizona Judicial Council](https://www.azcourts.gov/ajc/) (<https://www.azcourts.gov/ajc/>), a policy-making body that oversees the judicial system in the state, in October. With the council's blessing, the proposal will move forward from there. Any changes likely will require an amendment to the Arizona Constitution, Byers said. That would require a popular vote.

"It certainly will change the way we're doing business today," Byers said, adding that a new system would be a big change for the state's judges. "They're used to doing things routinely, in a certain way."

How the current cash bail system works



Phoenix police officers escort Arizona Cardinals running back Jonathan Dwyer, to the Fourth Avenue Jail following his 2014 arrest. His bond was set at \$25,000, which was posted immediately. (Photo: David Kadlubowski/The Republic)

On any given day, Maricopa County Superior Court hosts eight initial appearance hearings, which are the first time a defendant appears in a courtroom after an arrest.

The brief hearings are brief, stacked, and are required to occur within 24 hours of the defendant's arrest. Defendants are not entitled to an attorney at this point, and unless one is already retained, most will face the judge alone.

A judge reads the defendant his suspected charges, and sets a bond based on various factors including flight risk, severity of the alleged crimes, and whether the defendant poses a danger to the community.

Many are released on their own recognizance, meaning they are let out of jail immediately, albeit with some conditions. Others are deemed "not bailable," such as those suspected of first-degree murder, or charged with committing a new felony while already on release for a different felony charge.

For the rest, the judge will set a cash or surety bond, which can range from less than \$100 to more than \$1 million, and essentially allow a defendant to pay to get out of jail.

Cash bonds require the defendant to pay the full amount up front, while surety bonds allow the aid of a bail bondsman.

Arizona allows the bondsman to charge 10 percent of the bail amount, which will not be refunded.



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Both types act as the carrot to ensure the defendant shows up to court: Post a cash bond and don't show, lose the money. Use a bondsman and don't show, look out for a bounty hunter.

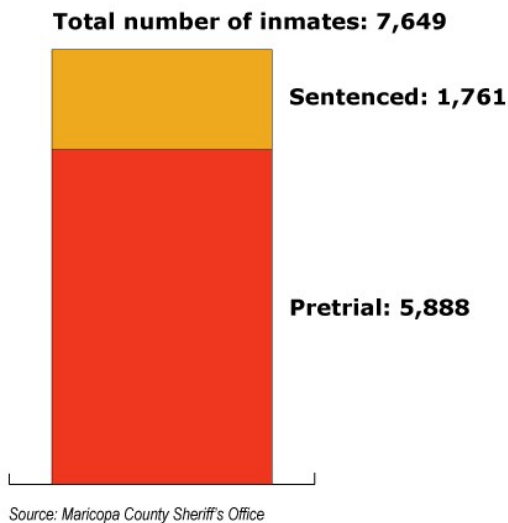
While minor charges for marijuana, drug paraphernalia, theft or DUIs can often warrant a bond setting of less than \$1,000 or \$2,000, even a fraction of the fee can be unrealistic for many.

More than 21 percent of Arizonans fall [below the federal poverty line](/story/money/business/economy/2015/10/04/arizona-remains-among-worst-poverty/73234934/) (</story/money/business/economy/2015/10/04/arizona-remains-among-worst-poverty/73234934/>).

Some say reforms to the current system could also help reduce jail populations. In Maricopa County, about 77 percent of the roughly 7,600 jail inmates on any given day are "pretrial," meaning they haven't been convicted of the suspected crime.

Inmates in Maricopa County jails

Numbers are as of Aug. 29, 2016.



A 2013 study (<http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf>) from the Pretrial Justice Institute found that

people paying for release were no more likely to show up than people who promised to pay the money on the back end if they failed to appear.

"Let's make it baseball cards — you get to post them when you get out," Byers said, with a touch of sarcasm. "Frankly, baseball cards would be just as predictive as money."

Proponents for the reform say keeping certain defendants in jail may make them more likely to commit future crimes. Those living paycheck to paycheck may become more susceptible to committing crimes after losing a job or commingling with other inmates, said Jeremy Mussman, deputy director at the Maricopa County Public Defender's Office. Mussman was a member of the task force and supports many of the proposed changes.

Research from the Laura and John Arnold Foundation (http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf) shows low-risk defendants are increasingly likely to be arrested again the longer they're in jail. When compared with defendants who are in jail for one day or less, those in jail for 2-3 days are 39 percent more likely to be arrested again, those in jail for 4-7 days are 50 percent more likely, and those in jail for 8-14 days are 56 percent more likely.

'Risk-based' release proposal similar to one already in use

The task force recommends switching to a "risk-based" release system, similar to a model already being used in Washington, D.C. There, the courts use evidence-based practices to break the defendants into three tiers.

- Low-risk defendants will be released on their own recognizance or with unsecured appearance bonds, meaning they only have to pay if they don't show up for court.
- Moderate-risk defendants, who will be released to pretrial services and given specific release conditions like electronic monitoring.
- High-risk defendants, who are held in custody. These would be defined as defendants who are a danger to the community or who have a history of failures to appear for court.

By its nature, the change will strip some defendants of what was once their often-pricey right to pretrial freedom. But, according to proponents, it's only if they're so risky they can't be managed outside of jail.



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[Phoenix murders spike in first half of 2016](http://www.azcentral.com/story/news/local/phoenix/2016/07/15/phoenix-murders-spike-first-half-2016/86957218/)

(<http://www.azcentral.com/story/news/local/phoenix/2016/07/15/phoenix-murders-spike-first-half-2016/86957218/>)

County attorney: Already moving toward 'a culture of release'



An inmate walks back to his tent after the lunch at Tent City Jail in Phoenix. (Photo: Nick Oza/The Republic)

Maricopa County Attorney Bill Montgomery said he's open to discussing the changes but stressed that Arizona courts already employ a risk-based assessment system.

Beginning largely in 2014, Arizona courts began aiming toward a "culture of release (<http://www.ncsc.org/~media/Microsites/Files/PJCC/Pretrial%20Justice%20Brief%203%20-%20AZ%20final.ashx>)," by using a risk-assessment tool to help predict release behavior, he said.

"In some ways, I think we're making this problem more difficult than it needs to be," Montgomery said. "Are we keeping that person in custody because we don't like them or they're poor? No. They're in jail because of underlying criminal conduct. The fee, that's a secondary consequence."

Mussman of the public defender's office acknowledged that while Arizona courts have "made strides" in recent years, he believes it's only the first step.

"Yes we have these tools, and yes, people are being told that there's a better way to it," Mussman said. "But money is still pervasive."



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(<http://www.azcentral.com/story/news/local/phoenix/2016/06/28/phoenix-worst-spot-for-crime/86429876/>)

"Non-bondable" portion raises concerns

Proponents also say the new system would solve problems like judges setting arbitrarily high money amounts for the sole purpose of keeping defendants in custody, a practice they argue is unlawful. Overall, they say, the new system will allow courts to place the right defendants in the right places and avoid situations like one seen recently in Missouri.

In 2013, a judge set a \$2 million bond for a Saudi national accused of paying his roommate to kill a bar owner in the college town of Warrensburg. The judge, however, refused to release Ziyad Abid after the Saudi Arabian government posted the money, acknowledging that he may be violating the Missouri constitution, according to Associated Press reports.

The portion of the proposed system that would effectively give judges more power to hold defendants on any number of crimes may not sit well with defense attorneys, Mussman said.

"The defense attorney part of me is saying, 'So, as part of this whole process you're going to give the courts the ability to broaden the categories of holding people non-bondable?'" he said. "Most of my brethren in the defense community, their knee-jerk reaction to that is going to be, we need to be vehemently against that."

Mussman said that until he sees the proposed legislation, he is skeptical that there will be enough safeguards to justify broadening the scope of defendants found non-bondable.

"An old adage in the criminal justice system is that no judge has ever gotten in trouble for holding someone in custody," he said. "But I do appreciate the effort to try to make the system work better for poor people."



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(<http://www.azcentral.com/story/news/local/phoenix/2016/07/01/phoenix-police-begin-testing-all-rape-kits/86581248/>)

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